Supreme Court, U.S.
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**In The**
**Supreme Court of the United States**
**OCTOBER TERM, 1997**

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
*Plaintiff-Petitioner*

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
*Defendants-Respondents*

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**On Petition for Writ Of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

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# APPENDIX VOLUME I

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

DAVID SCHUDEL, et al.,
*Plaintiffs,*
and
DEBORAH GUARAGNA-WILLIAMS,
*Plaintiff-Appellee,*
v.
GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
*Defendants-Appellants.*

**No. 95-35092**

**D.C. No. CV-92-00081-FVS**

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; JOHN HOPKINS; RUTH HOPKINS, husband and wife, and the marital community composed thereof,
*Plaintiffs-Appellants,*
v.
GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
*Defendants-Appellees.*

**No. 95-35145**

**D.C. No. CV-92-00081-FVS**

**OPINION**

Appeals from the United States District Court
for the Eastern District of Washington
Fred Van Sickle, District Judge, Presiding

Argued and Submitted
October 8, 1996—Seattle, Washington

Filed July 23, 1997

Before: James R. Browning, Dorothy W. Nelson, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Browning

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## SUMMARY

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### Civil Litigation and Procedure/Motions

The court of appeals dismissed appeals, vacated a judgment, and reversed orders of the district court. The court held that in considering a Rule 50(b) post-verdict motion for judgment notwithstanding the verdict (JNOV), a district court should not ignore erroneously admitted evidence.

Appellees David Schudel, Deborah Williams and others sued appellants General Electric Co. and Kaiser Aluminum and Chemical Corp. for damages, alleging injuries from exposure to toxic substances and loss of consortium.

At trial, the only evidence on causation on behalf of appellants Daniel Glass, Craig Thompson, and David, Tim, and Sandra Schudel (Schudel plaintiffs) was the testimony of Dr. Paula Lantsberger. She based her expert opinions on two theories: specific condition causation and "whole person aggravation."

In addition to Dr. Lantsberger, Drs. Morton and Goldstein testified on neurological symptom causation on behalf of Williams. The district court approved their reliance on interview data relating to the plaintiffs' symptoms that was collected by Diane Nebel while she was investigating an incident of Legionnaire's disease at Kaiser's facility.

Drs. Goldstein and Lantsberger testified that the Nebel

data were the kind that toxicologists consider reliable and regularly rely on. Dr. Morton testified that Williams suffered from brain damage that was "more probably than not" caused by exposure to solvents (TCA and Perc) that General Electric had used to clean up toxic substances at Kaiser's facility.

Dr. Goldstein conceded that none of the organic solvents involved in this case had been proven to be neurotoxic; that it would be improper to make inferences as to the toxicity of TCA and Perc based on the toxic nature of other solvents; and that repeated exposure to organic solvents over a long period must be documented to establish a causal relationship. Two studies cited by Dr. Goldstein (Altman and Kalifant studies) involved TCA and Perc. The Altman study found no relationship between exposure to Perc and the brain damage or loss of consciousness alleged by the plaintiffs. The Kalifant study involved long-term, repetitive exposure to TCA at high levels.

A jury returned verdicts for the plaintiffs. On defense motions for JNOV or a new trial, the district court affirmed the verdict for Williams, but granted JNOV with respect to respiratory injuries alleged by appellant Merlin Carlson, and as to neurological injuries asserted by appellant Kathrene Froese, John Hopkins, and Ruth Hopkins (Froese plaintiffs). The court vacated the verdicts for them on the ground that they were "tainted" by evidence of injuries as to which JNOV had been granted, and ordered a new trial. Lastly, the court granted JNOV on all the claims of the Schudel plaintiffs. In doing so, the court excised Dr. Lantsberger's testimony relating the "whole person aggravation" theory, having concluded that it was inadmissible. Both sides appealed.

[1] The court of appeals has jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable. [2] Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. The Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

[3] The district court granted JNOV as to issues related

to certain injuries allegedly suffered by the plaintiffs because of the defendants' negligence. The court of appeals had no jurisdiction to review the district court's rulings on those issues because the claims for negligence and the derivative claims for loss of consortium were not finally determined. The order granting a new trial was also interlocutory and not immediately appealable.

[4] When deciding a JNOV motion, a trial court may not ignore evidence erroneously admitted at trial. Excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was inadmissible. [5] The record should be taken as it existed when the trial closed.

[6] The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory should have been excluded. However, once the jury rendered its verdict based on the improperly admitted evidence, the district court erred in excising that evidence when ruling on the JNOV motion. Considering all the evidence, there was sufficient evidence to support the verdict in favor of the Schudel plaintiffs.

[7] Nonetheless, these verdicts could not stand. The district court erred in denying the defendants' motion for a new trial. A new trial should be granted when the erroneous admission of evidence affected the substantial rights of the parties. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

[8] The trial judge must determine that proposed scientific expert testimony will be both reliable and relevant. [9] Scientific knowledge is reliable if it is grounded in the methods and procedures of science and connotes more than subjective belief or unsupported speculation. In determining reliability, the focus must be solely on principles and methodology, not on the conclusions that they generate.

[10] Evidence of scientific knowledge is relevant if the reasoning or methodology properly can be applied to the facts in issue. A court's determination of relevance must consider the applicable substantive standard. Under Washington tort law, a plaintiff must show that the act complained of "probably" or "more likely than not" caused the subsequent disability.

[11] The Nebel data provided the basis for much of the scientific testimony presented by Williams' experts. [12] The

district court acted within its discretion in approving the use of the data by Williams' expert witnesses. Dr. Morton's testimony met the relevance requirement. However, it did not meet the requirement of reliability.

[13] Dr. Morton's conclusions were based on extrapolations from studies that involved solvents other than TCA or Perc and examined long-term exposure at relatively low concentrations, or short-term exposure at very high concentrations, rather than short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish that it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals.

[14] The district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.

[15] Dr. Goldstein acknowledged that the mechanism of neurotoxicity from TCA and Perc had not been demonstrated. [16] Dr. Lantsberger's testimony failed to meet the relevance requirement. She testified that it was only a "possibility," not a "probability," that Williams suffered from brain damage from exposure to solvents. Dr. Lantsberger admitted that she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied on a "whole person aggravation" theory without establishing that it had a scientific basis. [17] Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible. Like Dr. Goldstein, she relied on the Altman and Kalifant studies to reach her conclusions, and admitted that medical science had not determined the effects of short-term exposure to the solvents.

[18] Only one of the expert witnesses whose testimony was not challenged provided causation testimony, and it related only to Williams' respiratory injury. [19] Considering all the evidence admitted at trial, the district court properly denied the defendants' JNOV motion with respect to Williams. However,

admission of the challenged testimony was prejudicial because it was the sole causation evidence with respect to Williams' neurological symptoms.

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## COUNSEL

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## OPINION

**BROWNING**, Circuit Judge:

This diversity case involves claims for damages from negligence and loss of consortium against defendants General Electric Company and Kaiser Aluminum and Chemical Corporation. Kaiser contracted with General Electric to clean up polychlorinated biphenyls (PCBs) at Kaiser's Trentwood facility in Spokane, Washington. Nine of the ten plaintiffs were employed

by General Electric on the cleanup.[1] These plaintiffs alleged they developed various neurological and respiratory problems from exposure to two cleaning solvents, trichloroethane (TCA) and perchloroethylene (Perc).

A jury returned verdicts for the plaintiffs. The defendants moved for JNOV or new trial. The district court affirmed the verdict in favor of one plaintiff, Deborah Williams. The court granted JNOV with respect to respiratory injuries[2] asserted by Merlin Carlson ("Carlson") and with respect to neurological injuries[3] asserted by Kathrene Froese, John Hopkins, and Ruth Hopkins ("the Froese plaintiffs"). The court ordered a new trial with respect to injuries of Carlson and the Froese plaintiffs as to which JNOV had not been granted. Finally, the court granted JNOV on all claims asserted by the five remaining plaintiffs ("the Schudel plaintiffs"[4]).

Defendants appeal the verdict in favor of plaintiff Williams. The other plaintiffs appeal the granting of motions for JNOV or new trial. We address four issues: (1) whether the district court had jurisdiction over the defendants' motions for JNOV or new trial; (2) whether we have jurisdiction to review the district court's order for JNOV and new trial as to Carlson and the Froese plaintiffs; (3) whether the district court erred by granting JNOV against the Schudel plaintiffs without considering expert testimony the court concluded after trial had been erroneously admitted; and (4) whether the district court properly admitted expert testimony on behalf of plaintiff Williams.

## I. District Court Jurisdiction Over the Defendants' Motions For JNOV or New Trial

Plaintiffs argue the district court lacked jurisdiction to

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[1] The tenth plaintiff, Sandra Schudel, did not work at the site, but asserted a loss of consortium claim as the wife of plaintiff Tim Schudel.

[2] With respect to Carlson, the term "respiratory injuries" applies to respiratory injuries, fatigue, overall body pain, and all other all alleged injuries that do not fall within the term "neurological injuries."

[3] With respect to these plaintiffs, the term "neurological injuries" applies to neurological injuries, headaches, rashes, and all other alleged injuries that do not fall within the term "respiratory injuries."

[4] David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson.

consider defendants' motions for JNOV or new trial because the motions were not properly served.[5] When the motions were filed, Federal Rules of Civil Procedure 50 and 59 required the defendants to both file and serve such motions within ten days after entry of judgment.[6] Defendants filed the motions and delivered them to Federal Express for service on the tenth day after judgment. While personal delivery or delivery to the U.S. Postal Service would have satisfied the service requirement, delivery to Federal Express did not. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996).

Rules 50 and 59 were amended in 1995, however, to require only that such motions be filed, not served, no later than 10 days after entry of judgment. *See* Fed. R. Civ. P. 50(b), 59(b). The amendments took effect December 1, 1995, and "govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." S. Ct. Order, Amendments to the Federal Rules of Civil Procedure (Apr. 27, 1995).

This proceeding was pending on December 1, 1995, and no prejudice will result from application of the amendments. All parties have briefed the substantive, non-jurisdictional arguments in detail. No additional action on the part of the court or the parties is required to proceed. We have applied amended federal rules of appellate procedure retroactively in similar circumstances. *see Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir. 1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994), and do so here.

## II. Appellate Jurisdiction Over Order Granting JNOV and New Trial to Carlson and the Froese Plaintiffs.

The district court granted JNOV with respect to respiratory injuries allegedly sustained by Carlson and with respect to neurological injuries allegedly sustained by the Froese plaintiffs. The court vacated the verdicts for these plaintiffs on

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[5] Plaintiff Carlson does not raise this issue; his attorney was timely served.

[6] *See* former Fed. R. Civ. P. 50(b) ("Such a motion [for judgment as a matter of law] may be renewed by service and filing not later than 10 days after entry of judgment."); former Fed. R. Civ. P. 59(b) ("A motion for a new trial shall be served not later than 10 days after the entry of judgment.").

the ground that they were "tainted" by the evidence of the injuries as to which JNOV had been granted, and ordered a new trial as to Carlson's neurological injuries and the Froese plaintiffs' respiratory injuries. The court certified appeals from the orders for new trial pursuant to Federal Rule of Civil Procedure 54(b).[7]

[1] We have jurisdiction to review final judgments on entire claims, not on individual issues. An order adjudicating only one issue that is not determinative of an entire claim is not appealable even if a district court certifies the order under Rule 54(b). *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991). We must determine independently whether a certified judgment is final as to a particular claim.[8] *Id.*

[2] Litigants who advance a single legal theory of liability applied to one set of facts allege a single claim. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 (1976). Carlson and Froese alleged a single claim of negligence, not separate claims for neurological injury and respiratory injury. Similarly, the Hopkinses alleged claims for negligence and loss of consortium, not separate claims for neurological injury and respiratory injury as to each claim.

[3] The district court granted JNOV as to issue related to certain injuries allegedly suffered by plaintiffs because of defendants' negligence. We have no jurisdiction to review the court's rulings on these issues because the claims for negligence and the derivative claims for loss of consortium have not been finally determined. The order granting new trial is also interlocutory and not immediately appealable. *Allied Chem. Cor. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Roy v. Volkswagenwerk*

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[7] Under Fed. R. Civ. P. 54(b), when a lawsuit involves multiple claims or multiple parties, a district court "may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

[8] Carlson and the Froese plaintiffs argue the standard of review is not *de novo*, but abuse of discretion. We review the certification of an appeal under Rule 54(b) for abuse of discretion. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991). Even though a decision is certified under Rule 54(b), however, we must independently ensure that we are dealing with a final judgment before exercising jurisdiction. *Arizona State Carpenters*, 938 F.2d at 1039.

*Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir. 1985).[9]

## III. Excising Testimony in Granting JNOV

The Schudel plaintiffs argue the district court erred in excising the previously admitted testimony of Dr. Paula Lantsberger before granting defendants' motion for JNOV. We agree.

Dr. Lantsberger was the only witness on causation on behalf of the Schudel plaintiffs. Dr. Lantsberger described symptoms and offered specific testimony regarding causation under two theories: a specific condition causation theory; and a "whole person aggravation" theory. The defendants filed a motion to exclude Dr. Lantsberger's causation testimony prior to trial and a motion to strike the testimony during trial. The district court did not rule on these motions.

After the jury returned verdicts in favor of plaintiffs and defendants moved for JNOV, the court held that Dr. Lantsberger's causation testimony based on the "whole body aggravation" theory had been admitted erroneously. The court then considered the sufficiency of the remaining evidence to support the jury verdicts and granted the motion for JNOV. The court denied defendants' alternative request for a new trial.

[4] Four circuits have held that, when deciding a motion for JNOV, a trial court may not ignore evidence erroneously admitted at trial, reasoning that excluding evidence after the verdict is unfair to a party who may have relied on the determination that the evidence was admissible.[10] "If evidence is

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[9] Carlson and the Froese plaintiffs argue this court has jurisdiction to review a conditional grant of a new trial under Fed. R. Civ. P. 50(c). *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 n.15 (9th Cir. 1989) (stating that appellate courts may review conditional new trial orders because the plain language of Rule 50(c)(1) expressly permits this review). The district court ordered a new trial under Rule 50(b), not Rule 50(c)(1). The order was not conditioned on reversal of the order granting JNOV. Rule 50(b) does not provide for review of non-conditional new trial orders.

[10] *See Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973). The Third Circuit has held that such

ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already introduced, is unable to remedy the situation." *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993).

[5] We recently indicated we would abide by the same rule. *See Central Office Tel., Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir. 1997). We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing. *Jackson*, 980 F.2d at 696 n.4.

[6] The district court properly concluded that Dr. Lantsberger's testimony based on the "whole person aggravation" theory of causation did not meet the standard of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (*Daubert I*), (outlined in Part IV of this opinion), and should have been excluded. Once the jury rendered its verdict based on the improperly admitted evidence, however, the district court erred in excising that evidence when ruling on the motion for JNOV. Considering all the evidence admitted at trial, including Dr. Lantsberger's "whole person aggravation" theory testimony, we conclude there was sufficient evidence to support the jury verdicts in favor of the Schudel plaintiffs.

[7] Nonetheless, these verdicts may not stand. The district court erred in denying defendants' motion for new trial. A new trial should be granted when the erroneous admission of

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exclusion is proper as long as other evidence relating to the same issue was not barred during trial as cumulative, reasoning that the moving party has a competing interest in litigating a case only once and expressing doubt that litigants would hold back significant evidence at trial. *Lightning Lube, Inc., v. Witco Corp.*, 4 F.3d 1153, 1199-1200 (3d Cir. 1993).

evidence affected the substantial right of the parties. Fed. R. Civ. P. 61. Dr. Lantsberger's testimony was the only evidence of causation; its erroneous admission was undoubtedly prejudicial.

## IV. The Defendants' Appeal

Defendants argue the neurological symptom causation testimony of Dr. William Morton, Dr. Daniel Goldstein, and Dr. Lantsberger underlying the jury verdict for Deborah Williams was not admissible under Federal rule of Evidence 702.[11]

### A.

[8] The Supreme Court held in *Daubert I*, 509 U.S. at 590-91, that Rule 702 requires the trial judge to determine that proposed scientific expert testimony will be both reliable and relevant. *See also Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1313 (9th Cir. 1995) (*Daubert II*).

[9] Scientific knowledge is reliable if it is "ground[ed] in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation." *Daubert I*, 509 U.S. at 590. In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

[10] Evidence of scientific knowledge is relevant if the "reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593; *see also Daubert II*, 43 F.3d at 1315 (evidence of scientific knowledge must "logically advance[ ] a material aspect of the proposing party's case"). A court's determination of relevance must consider the applicable substantive standard. *See id.* at 1320. Under Washington tort law, a plaintiff must show that the "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 440 P.2d 823, 830 (Wash. 1968). This is virtually the same as the standard under California tort law applied in *Daubert II*. *See* 43 F.3d at 1320. Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the

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[11] Defendants also argue the trial court should have held a pretrial hearing on the admissibility of the testimony of Williams' experts. Because we conclude the expert testimony should have been excluded, we do not decide whether a pretrial hearing should have been held.

relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries, i.e., that use of the drug more than doubled the likelihood the injuries would occur. 43 F.3d at 1320-22.

**B.**

[11] The district court approved reliance by Williams' experts on interview data collected by Diane Nebel. Nebel contacted many of the workers at the Kaiser facility after one of the project supervisors fell ill with Legionnaire's disease. Nebel found no evidence of Legionnaire's outbreak, but did discover that some of the workers, including the plaintiffs, suffered from various medical symptoms. The data collected in Nebel's Legionnaire's disease investigation provided the basis for much of the scientific testimony presented by Williams' experts at trial.

[12] The district court acted within its discretion in approving the use of this data by Williams' expert witnesses. Dr. Goldstein and Dr. Lantsberger both testified the data was of the type toxicologists consider reliable and regularly rely upon. *See* Fed. R. Evid. 703.

Dr. Morton testified that plaintiff Williams suffered from solvent-induced toxic encephalopathy which "more probably than not" was caused by exposure to Perc and TCA. Dr. Morton's testimony met *Daubert's* relevance requirement. However, it did not meet *Daubert's* requirement of reliability.

[13] Dr. Morton's conclusions were based on extrapolation from studies that: (1) involved organic solvents other than TCA or Perc; and (2) examined long-term exposure at relatively low chemical concentrations or short-term exposure at very high concentrations, rather than the short-term, moderate-level exposure sustained by Williams. Dr. Morton did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed, the testimony indicated small differences in molecular structure often have significant consequences.

[14] As to differences in length and intensity of exposure, the district court erroneously reasoned that because there was evidence that acute exposure to TCA and Perc can cause toxic

encephalopathy, whether Williams' exposure was sufficient to cause her symptoms was a question for the jury. Williams' exposure was neither long enough nor intense enough to fall within the ranges described in the studies Dr. Morton relied upon. Extrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.[12]

Dr. Goldstein's testimony suffered from similar deficiencies. Dr. Goldstein conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic. He also testified that it would be improper to infer conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents, and that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship.

[15] Dr. Goldstein acknowledged that the biochemical mechanism of neurotoxicity from TCA and Perc has not been demonstrated. Only two studies cited by Dr. Goldstein involved TCA and Perc, and neither met *Daubert* standards. The Altman study found no relationship between exposure to Perc and the toxic encephalopathy or loss of consciousness alleged by the plaintiffs. The Kalifant study involved long-term (7-15 years), repetitive exposures to TCA at high levels.

[16] Dr. Lantsberger's testimony failed to meet *Daubert's* relevance requirement. She testified it was only a "possibility," not a "probability," that Williams suffered organic brain damage from exposure to solvents at the facility. Dr. Lantsberger admitted she could not testify to a specific cause and effect relationship between Williams' exposure and health problems. She relied instead on a "whole person aggravation" theory without establishing that the theory had a scientific basis.

[17] Dr. Lantsberger's testimony regarding the hazards of TCA and Perc was inadmissible under *Daubert*. Dr. Lantsberger, like Dr. Goldstein, relied on the Altman and Kalifant articles to reach her neurotoxicity conclusions, and like Dr. Goldstein, admitted that medical science has not determined the

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[12] Given our analysis of the admissibility of Dr. Morton's testimony, we need not consider defendants' contention that his testimony should have been excluded because testimony based on case reports is not admissible under *Daubert*.

effects of short-term exposure to the solvents involved.

[18] Plaintiff Williams points to other expert witnesses whose testimony was not challenged by defendants. Only one of these experts provided causation testimony, and his testimony related only to Williams' respiratory injury.

[19] Considering all the evidence admitted at trial, including the erroneously admitted evidence, we hold the district court properly denied defendants' motion for JNOV with respect to Williams. Admission of the challenged expert testimony was prejudicial, however, because it was the sole causation evidence with respect to Williams' neurological symptoms. Accordingly, we vacate the judgment entered on the jury verdict, reverse the district court's denial of defendants' motion for a new trial, and remand.

*CONCLUSION*

We lack jurisdiction to review the district court's grant of JNOV and new trial as to plaintiffs Merlin Carlson, Kathrene Froese, John Hopkins, and Ruth Hopkins, and DISMISS their appeals.

We REVERSE the grant of JNOV and the denial of the motions for new trial as to the plaintiffs David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and REMAND.

We find plaintiff Deborah Williams' neurological expert testimony on causation inadmissible, VACATE the judgment entered on the jury verdict in her favor, REVERSE the denial of the motion for new trial, and REMAND.

DISMISSED in part, and VACATED, REVERSED, and REMANDED in part. No costs allowed.

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NOV 25 1994
JAMES R. LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| DAVID SCHUDEL, et al, et ux.<br><br>Plaintiffs,<br><br>vs.<br><br>GENERAL ELECTRIC COMPANY and KAISER ALUMINUM AND CHEMICAL CORPORATION,<br><br>Defendants. | NO. CS-92-081-FVS<br><br>ORDER RE POST-TRIAL MOTIONS |

**BEFORE THE COURT** are certain post-trial motions. They were decided without oral argument on November 22, 1994. See Local Rule ("LR") 7(h)(3).

## I. PLAINTIFFS' MOTION TO STRIKE

### A. Background

Judgment was entered on July 13, 1994. On July 27, 1994, the defendants filed motions for both judgments as a matter of law and a new trial. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59. That same day, copies of the motions were mailed to opposing counsel via Federal Express.

The plaintiffs now move the Court to strike the defendants' Rule 50(b) and Rule 59 motions. They argue that the

motions were not served in a timely manner.

**B. Ruling**

Motions for judgment as a matter of law and for a new trial must be filed and served within ten days of the date judgment is entered. Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 59(b). In calculating the ten-day deadline, neither intermediate weekends nor legal holidays are counted. Fed.R.Civ.P. 6(b). Thus, the defendants had until the twenty-seventh of July to file and serve their Rule 50(b) and Rule 59 motions.

It is undisputed that the defendants mailed copies of their motions to all opposing parties by Federal Express on July 27, 1994. Since "[s]ervice by mail is complete upon mailing," Fed.R.Civ.P. 5(b), the defendants' motions would appear to have been both filed and served prior to the deadline.

The plaintiffs disagree. They contend that sending documents by Federal Express does not constitute "mailing" within the meaning of Rule 5(b).

Notwithstanding the plaintiffs' disagreement, they have failed to cite a single decision adopting their interpretation of Rule 5(b). They are forced to rely upon Transco Leasing Corp. v. United States, 992 F.2d 552, 554 n.2 (5th Cir. 1993), a case in which the Fifth Circuit cautioned, in dicta, "that service by Federal Express may not be service by mail."[13]

The defendants, by contrast, have cited two district courts decisions that considered – and rejected – the plaintiffs' position. Both held that Rule 5(b) does not require mailing through the United States Postal Service. United States v. Certain Real Property & Premises Known As 63-29 Trimble Rd., 812 F.Supp. 332, 334 (E.D.N.Y. 1992); Edmond v. United States Postal Serv., 727 F.Supp. 7, 11 (D.D.C. 1989), rev'd on other grounds, 949 F.2d 415 (1991).

Here, it was reasonable for the defendants to believe that the method of service they utilized would be more prompt than ordinary first class mail, and every bit as reliable. Given the plaintiffs' failure to cite authority supporting their interpretation of Rule 5(b), and the fact that two district courts have specifically rejected their position, the plaintiffs' motion to strike will be

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[13]Professors Wright and Miller mention Transco, but do not analyze the issue. 4A C. Wright, A. Miller, Federal Practice and Procedure, § 1148 (2d ed. Supp. 1994).

denied.

## II. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW.

The defendants offer six reasons why the Court should grant judgment as a matter of law. Fed.R.Civ.P. 50(b). They are as follows: (1) the plaintiffs' experts based their opinions upon unreliable data; (2) certain experts were not qualified, and their opinions do not constitute "scientific knowledge" within the meaning of Rule 702; (3) even if the disputed opinions are admissible, they fail to establish causation; (4) under Washington law, many of Dr. Lantsberger's opinions regarding causation are legally insufficient; (5) the plaintiffs were loaned servants; and (6) Kaiser owed no duty of care to the plaintiffs.

### A. Reliability/Loaned Servant/Duty

Not all of the defendants' arguments require in-depth analysis. The first, fifth, and sixth may be disposed of rather quickly.

#### *1. Reliability of Data*

The Court refused to admit the "Nebel" exhibits because they were hearsay, and the plaintiffs had not demonstrated the applicability of an exception to the hearsay rule. Moreover, even if an exception had applied, the exhibits were cumulative. (Tr. at 5790-91).

Later, the defendants attempted to impeach Craig Thompson with statements he made to Ms. Nebel. See Fed.R.Evid. 801 (d) (2) (A) (admission by party-opponent). The plaintiffs objected. (Tr. at 5970.) In sustaining the objection, the Court said, in part, "They [the Nebel exhibits] were not admitted because of concerns about reliability."" (Tr. at 5984.)

The defendants have interpreted the court's statement as a finding that the Nebel exhibits were unreliable. When both sections of the transcript are read in context, it is evident that no such finding was intended.

#### *2. Loaned Servant*

The jury was instructed properly on the question of "loaned servant." Since there is substantial evidence to support the jury's determination that the plaintiffs were not loaned servants, there is no basis for granting the defendants judgment on

this issue.

*3. Duty of Care*

With Respect to the question of "duty," the defendants have cited no new authority. The Court is satisfied that a duty existed.

**B. Admissibility of Certain Expert Opinions**

The second argument focuses on the admissibility of opinions given by Drs. Lantsberger, Goldstein, and Morton. The defendants submit that these three witnesses were not qualified to render opinions regarding toxic encephalopathy, and that their theories of organic brain damage are not supported by the scientific literature.

Both prongs of the second argument were raised prior to (and during) trial. After reviewing the materials presented by the parties, the Court ruled against the defendants on both issues.

Since then, the Ninth Circuit has decided two civil cases, the outcome in each hinging on the admissibility of expert testimony. Both opinions discuss the requirements of Rule 702 in light of Daubert v. Merrel Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Both agree that expert testimony may not be admitted unless the trial judge first determines that the expert's conclusions are based upon scientific knowledge. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994); Claar v. Burlington Northern R. Co., 29 F.3d 499, 502 (9th Cir. 1994).

Although Hopkins and Claar are clearly relevant here, neither dictates a result different than that previously reached by the Court. As a result, the Court declines to disturb its prior rulings regarding toxic encephalopathy.

**C. Sufficiency of Certain Expert Opinions (Background)**

The third and fourth arguments challenge the sufficiency of certain expert opinions – primarily those of Dr. Lantsberger. Because this part of the defendants' Rule 50(b) motion attacks sufficiency, it is necessary to describe the disputed opinions in some detail.

**1. Dan Glass**

Mr. Glass reported a number of symptoms to Dr. Paula Lantsberger, including heart palpitations, headaches, memory loss, and respiratory problems. Dr. Lantsberger was the only expert

who attempted to link any of Glass' specific symptoms to work at Kaiser.

*(a) Deposition Testimony*

During a deposition in November, 1993, Dr. Lantsberger testified that she "just [didn't] know what caused [the heart palpitations]." (Tr. at 2317.)

With respect to a headache Glass complained of during May, 1990, Dr. Lantsberger testified that "it was probably a more migrainous type of headache and that its' probably not [related] to his exposure." (Tr. at 2325.)

Dr. Lantsberger was asked the following question regarding a headache Glass reported during September, 1991. "[I]s it true that the headache that he complained of when you last saw him is unrelated to his industrial exposure at Kaiser?" (Tr. at 3180.) "True," she replied. Id.

Dr. Lantsberger was asked what factors she had considered in determining whether Glass' brain had been injured during the cleanup. They included "his function and his performance since working at Kaiser," "the absence of any objective, neurologic findings," and "the literature on mixed organic solvents." (Tr. at 3181.) Having considered those factors, she was asked whether it was true that she had concluded "that [Dan Glass] did not sustain brain damage as a result of working at Kaiser in 1988." Id. "Correct," she said. Id.

Finally, Dr. Lantsberger was asked to review a report prepared by Dr. Patricia Sparks, a board-certified specialist in occupational medicine. (Dr. Sparks had examined Mr. Glass at the request of Washington's Department of Labor and Industries.) In her report, Dr. sparks had said "that there is no respiratory, neurological or mental impairment resulting from [Glass'] previous exposures on a more probable than not basis." (Tr. at 2350.) Dr. Lantsberger was asked whether she agreed with that statement. Once again, her response was, "Correct." Id.

*(b) Direct Examination*

Dr. Lantsberger's testimony at trial was dramatically different. She now said that it was probable that Glass had a pre-existing lung condition which had been aggravated by "exposure to chemicals." (Tr. at 1893.) She now assumed that Glass' headaches were related to the exposure. (Tr. at 1895.) She now opined "that there may be a relationship between his heart

symptoms while working on the site and his exposure to the chemicals." (Tr. at 1897.) Finally, in apparent reference to allegations of memory loss and difficulty in concentrating, she now said "that the symptoms that [Glass] was complaining of that had been a change over his base line would be related to his exposures." (Tr. at 1899.)

*(c) Cross-examination*

Dr. Lantsberger testified that she first examined Dan Glass during October, 1989, approximately ten months after the cleanup project. He did not complain of respiratory problems. (Tr. at 2288.) His examination was essentially normal. (Tr. at 2298.) He had normal pulmonary functions. (Tr. at 2305-06.) At that point, Dr. Lantsberger did not diagnose any respiratory injury or disease. (Tr. at 2312.)

Glass next went to Dr. Lantsberger during May, 1990. Once again, he neither mentioned respiratory problems, nor did Dr. Lantsberger diagnose any. (Tr. at 2326.) Glass did complain of headaches. However, during cross examination, Dr. Lantsberger conceded that she could not say there was a specific cause-and-effect relationship between his industrial exposure and the headaches he described. (Tr. at 2326.)

Dr. Lantsberger's last examination of Mr. Glass occurred during September, 1991. (Tr. at 2333.) At that time, he made no mention of respiratory problems. Id. He did, however, report headaches and memory loss. (Tr. at 2332.)

With respect to the former, Dr. Lantsberger again conceded that she was unable to find a cause-and-effect relationship between Glass' work at Kaiser and the headaches he mentioned. (Tr. at 2334.) With respect to the latter, Dr. Lantsberger's answers were somewhat coy. Nevertheless, when pressed by defense counsel, she finally acknowledged that she agreed with two other experts who had reported that Glass had no neurological or psychological impairment as a direct result of his work at Kaiser. (Tr. at 2347-52.)

*(d) First Redirect Examination*

On redirect, Dr. Lantsberger said that she thought Mr. Glass had experienced an "alteration in his level of consciousness" while working at Kaiser. (Tr. at 3099.) She did not, however, attempt to link that phenomenon with a specific injury.

Later, Dr. Lantsberger was asked whether it made

"scientific sense" to determine whether each condition Mr. Glass' complained of could be attributed to work at Kaiser. (Tr. at 3138.) She denied that it did, insisting that "you have to look at the patient as a whole." Id.

Insofar as her prior testimony was concerned, Dr. Lantsberger said, "I was trying to indicate that as a specific, isolated, single, sole source cause, no, I couldn't ascribe things as each individual cause. I had to take them as a whole and as an aggregate group of, aggregate group of people, to provide the data I needed to develop my opinions." Id.

*(e) First Recross Second Redirect*

During First Recross, Dr. Lantsberger was impeached with her prior deposition testimony. (Tr. at 3179-81.) In an effort to rehabilitate her, counsel for the plaintiffs attempted to show that the statements quoted by defense counsel referred to an examination requested by the Department of Labor and Industries. Plaintiffs' counsel implied that in the context of a Labor and Industries examination, a finding of "impairment" must be based upon certain limited objective factors. (Tr. at 3203-06.)

At best, the effort at rehabilitation was only partially successful. As notes above, it is clear that the opinion which Dr. Lantsberger gave during her deposition (i.e., that Mr. Glass had sustained no brain damage) was based upon both subjective and objective factors. (Tr. at 3181.).

**2. David Schudel**

Mr. Schudel has been examined by Dr. Lantsberger on a number of occasions. Although Schudel described a number of symptoms, there were (at most)two medical conditions which Lantsberger was willing to say were more probably than not caused by his work at Kaiser. One was a sensitization to odors; the other was an "aggravation" of his "whole person."

*(a) Deposition Testimony*

David Schudel had been tested by psychologists Paul Domitor and Lloyd Cripe. Having reviewed that testing, Dr. Lantsberger was asked whether it was her "medical opinion that Mr. [David] Schudel does not have brain damage as a result of his industrial exposure at Kaiser?" (Tr. at 2980.) She replied, "Correct." Id.

During her deposition, Dr. Lantsberger described Schudel's reaction to odors as a "conditioned response." (Tr. at 2989.) She explained it this way:

> I kind of liken it to the Pavlov's dog theory. Then you put the dog, ring the bell, associate it with food, the dog salivates. You take Dave. You put him out with chemicals. You have somebody's investigation proceeding where he is seeing health effects that make him scared. Subsequently[,] he continues to be scared around chemicals.

(Tr. at 2990). Dr. Lantsberger was asked whether it was the investigation conducted by the county health department which rang the bell "and set in motion what has become — what has been a sort of cascading conditioned response from Mr. Schudel." Id. "Correct," she said. Id.

*(b) Direct Examination*

Dr. Lantsberger's causation testimony was interesting. When asked for the cause of "David Schudel's emotional reaction to smells." (Tr.at 1777), she said, "I think that on a reasonable medical certainty he did not have this before his initial exposure in 1988 and subsequently to that I think that it's, on a more probable than not basis, related to his initial chemical exposure in '88.") Id. In other words, since Schudel did not react to odors before being exposed to chemicals at Kaiser, it must be the exposure which caused the reaction.

Later, Dr. Lantsberger described certain pulmonary function tests which had been administered to Mr. Schudel after the trial was underway. (Tr. at 1840-41.) According to Dr. Lantsberger, the results indicated that Schudel's reaction to odors was not strictly psychological. (Tr. at 1841-42.)

Thereafter, Lantsberger was asked two additional causation questions. The first was "whether David Schudel's physical problems with chemicals, as far as his lungs, is in any way related to the 1988 clean-up?" (Tr. at 1843.) To this question she replied, "I do think that some of the problems that he's having with his lungs and reactions are reactions to his, his lung condition are related to this exposures in the '88 clean-up." Id.

As a second causation question, Lantsberger was asked "whether David Schudel would have these problems that you've identified if he was provided with adequate working protective

gear in 1988?" (Tr. at 1843-44.) Ultimately, she said, "I think that if they had had respiratory protection equipment at that time frame, I don't think that he would be reacting as badly as he has now." Id. at 1844.

*(c) Cross-examination*

During the course of cross-examination, Dr. Lantsberger conceded that David Schudel does not have Reactive Airway Dysfunction Syndrome. (Tr. at 2978). She further conceded that he did not sustain brain damage while working at Kaiser. (Tr. at 2979).

Since the Kaiser project, Schudel has had numerous tests, including methacholine challenge tests, pulmonary function tests, neuropsychological tests, and chest x-rays. (Tr. at 2992.) Dr. Lantsberger acknowledged that prior to trial, none of the tests had revealed any pathology. (Tr. at 2992.) It was not until the Spring of 1994 (five and one-half years after the cleanup project) that Dr. Lantsberger was able to produce test results which "showed some alteration in pulmonary function capabilities." (Tr. at 2993-94.)

By the end of cross examination, Dr. Lantsberger had begun to back away from her earlier diagnosis. When asked whether the most recent pulmonary function test results could be described as a conditioned response, Lantsberger said, "I don't ascribe as much of that to the conditioned response now that we've got some of the other confounding variables out of the way. We've gotten the smoking out of the way, and I have data with him on a work site with nurses monitoring him on the work site." (Tr. at 3012.)

*(d) Redirect*

On redirect, Dr. Lantsberger twice asserted that David Schudel had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3073, 3098.) No effort was made to link Schudel's alteration of consciousness with Lantsberger's prior diagnosis.

Later, counsel for the plaintiffs asked Lantsberger whether she had been cross-examined regarding "David Schudel as . . . a whole, live person or was it to the isolated incidences [sic] of his existence?" (Tr. at 3140-41.) The latter, Lantsberger said. Id.

Plaintiffs' counsel asked whether it is "scientifically sound to

consider David Schudel in terms of isolated incidences [sic]?" Id. "No," Dr. Lantsberger said, "it is not. You have to look at him in a whole." Id.

Finally, counsel for the plaintiffs asked, "Would you please tell the jury if you have any opinion as to David Schudel as a whole person in relationship to this exposure to the chemicals in 1988 on a more probable than not basis?" Id. After an objection, Lantsberger said, "[T]aking . . . into account the totality of his information and all of the information that was presented, in an aggregate way, I think that it was more probably than not an aggravation." Id.

*(e) First Recross Second Redirect*

During First Recross, Lantsberger again admitted that Schudel sustained no brain damage from working on the cleanup. (Tr. at 3189.) during Second Redirect, Lantsberger was asked to return to what plaintiffs' counsel described as "the Pavlov's dog analogy." (Tr. at 3218.) Although Lantsberger had appeared to distance herself from that comparison at the close of cross-examination, she now reiterated the theory. (Tr. at 3219, 3221.)

**3. Craig Thompson**

Dr. Lantsberger described a variety of symptoms while testifying on Mr. Thompson's behalf. Only a limited effort was made to link any of them to the cleanup project on a more probable than not basis.

*(a) Deposition Testimony*

Dr. Lantsberger first saw Mr. Thompson in October, 1989. He complained of memory loss, among other things. (Tr. at 2655.) With respect to memory loss, Dr. Lantsberger was asked the following questions during a deposition which took place in November, 1993. "[I]s it your testimony that his complaints of memory loss in 1989 may possibly have been due to his industrial exposure, but you can't say with probability that they were?" (Tr. at 2660.) "Correct," she replied. Id.

*(b) Direct Examination*

At one point, Dr. Lantsberger said that Thompson complained to her of feeling "very sleepy" and "high" while working at Kaiser. (Tr. at 1789-90). At another, she said she had treated him for memory loss. (Tr. at 1800). However, Lantsberger did not testify that Thompson's mental sensations reflected neurologic injury; nor did she say that his memory loss

could be attributed (on a more probable than not basis) to work at Kaiser.

With respect to respiratory impairment, Lantsberger testified that Thompson "had indicated to me that he had had an increase in the symptoms that he's had since his exposure while he was at work." (Tr. at 1821.) The increase in symptoms was apparently enough to persuade Lantsberger "that the exposure on the work site aggravated his lung conditions." (Tr. at 1822.)

*(c) Cross-examination*

Dr. Lantsberger saw Mr. Thompson during October, 1989. The physical examination was normal, with the exception of "crackles in the bases of his lungs." (Tr. at 2676.) Besides doing a physical exam, Dr. Lantsberger ordered a number of tests. While a chest x-ray and pulmonary function tests were normal, (Tr. at 2679, 2685), a methacholine challenge test was positive. (Tr. at 2680.)

Mr. Thompson went to Dr. Lantsberger during June, 1990, complaining of a sore throat and cough. (Tr. at 2694.) She diagnosed an upper respiratory infection. (Tr. at 2695.) When asked whether the infection was "probably related or caused by his industrial exposure," (Tr. at 2696), she replied, "As a direct, single affect [sic], causal relationship, no." Id.

During December, 1990, Thompson was seen by one of Dr. Lantsberger's colleagues. (Tr. at 2703.) He had an upper respiratory infection. Id. According to Lantsberger, Thompson "may have had more sensitive respiratory mucosa, resulting in him having an increased susceptibility to infection." (Tr. at 2704.) However, when questioned by defense counsel, she conceded that it was a possible cause not a probable cause. Id.

Thompson went to Lantsberger during January, 1991, for another respiratory infection. (Tr. at 2706.) Lantsberger was asked whether it was true that the infection had a possible- – but not a probable- – relationship to this work at Kaiser. Id. She said, "As a specific single etiology causal factor, correct." Id.

Thompson went from February, 1991, until September, 1992, without further respiratory problems. (Tr. at 2720.) During an examination in September, 1992, Lantsberger detected crackles in his lungs. (Tr. at 2721.) However, she conceded that the crackles were consistent with his "significant" smoking. Id.

*(d) Redirect Examination*

Dr. Lantsberger explained her "aggravation" theory during redirect. She said, "[T]he fact that he is having problems that exist now that didn't exist before he had his work at Kaiser leads me to think that there was some aggravation of these preexisting conditions as a result of his workplace." (Tr. at 3083.)

As she had with respect to Dan Glass and David Schudel, Dr. Lantsberger testified that Thompson had experienced an alteration of consciousness while working at Kaiser. (Tr. at 3098.) However, she made no effort to link Thompson's alteration of consciousness with her prior diagnosis.

*(e) First Recross*

During recross, Dr. Lantsberger repeatedly asserted that Thompson's condition had been "aggravated" by work at Kaiser. In each instance, she was confronted with strikingly inconsistent deposition testimony. See, e.g., Tr. at 3164 ("headaches he complained of in 1989 were different in frequency and severity and were most likely not related to the headaches that he was experiencing while he was on the job site"); Tr. at 3165 (possible that memory loss was due to industrial exposure, but not probable).

**4. Tim Schudel**

Dr. Lantsberger was the only expert to testify on Tim Schudel's behalf. While on the stand, she listed the various symptoms he had reported to her. However, when it came to the question of causation, her testimony was quite tentative.

*(a) Direct Examination*

Dr. Lantsberger was asked whether she had "an opinion based upon reasonable medical probability as to whether there's any relationship between Tim Schudel's lung problems and memory problems and his exposure to the chemicals in 1988?" (Tr. at 1885.) She responded in the following manner, "He indicated to me that he hadn't had any problems with memory or concentration or breathing problems prior to this employment on the job site." Id.

Shortly thereafter, Dr. Lantsberger was again asked whether she had "an opinion as to whether there's any relationship between Mr. Tim Schudel's long problems and his memory problems and the exposure to the chemicals in 1988?" (Tr. at 1888.)

She said, "Mr. Schudel had indicated to me in his history and through the testing process that he had not had any problems with his lungs nor any problems with his memory prior to being exposed in 1988." Id.

Plaintiffs' counsel followed up by asking, "So is there a relationship there?" Id. To which Lantsberger replied, "I believe so." Id.

*(b) Cross-examination*

Dr. Lantsberger acknowledged that although Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," Tr. at 2841, "[w]e never did get him in to see one." Id.

Mr. Tim Schudel was examined by psychologist Lloyd Cripe. Dr. Cripe asked that Mr. Schudel be informed "that there is no clear indication that his brain has been damaged as a result of his exposure." (Tr. at 2847.) Cripe went on to say, "While it is possible that his previous learning disabilities have been exacerbated or strained in some manner, it is not possible in a medical/legal manner to be reasonably certain that he has suffered any kind of appreciable brain dysfunction related to the industrial toxic exposure." Id.

After being counseled regarding Dr. Cripe's report, Schudel made no further complaints regarding memory loss. (Tr. at 2850.)

*(c) Redirect*

Dr. Lantsberger testified that Tim Schudel experienced an "alteration of consciousness" while exposed to chemicals at Kaiser. (Tr. at 3097.) As with the other workers, no effort was made to link that opinion to a specific diagnosis.

With respect to her "aggravation" opinion, Dr. Lantsberger said, "In relationship to him as a whole person in the totality of the information that was supplied to me, as a whole, I think that his condition was, on a more probable than not basis, an aggravation of his preexisting conditions." (Tr. at 3140.)

**5. Kathrene Froese**

Two experts testified regarding Ms. Froese's specific complaints. One was Dr. Jonathan Ostrow. The defendants concede that he "opined with reasonable medical probability that Ms. Froese [has] irritant-induced Reactive Airways Dysfunction Syndrome." (Defendants' Memorandum in Support of Renewed

Motion at 76.)

The other expert to testify regarding Ms. Froese's complaints was Dr. Lantsberger. She mentioned a number of non-respiratory problems, including rash (Tr. at 1846-48), memory loss (Tr. at 1851, 1862-64), headaches (Tr. at 2772-73), and "whole person" aggravation (Tr. at 3144.)

*(a) Direct examination of Dr. Lantsberger*

Ms. Froese told Dr. Lantsberger that she had developed a rash while working at Kaiser. (Tr. at 1846.) According to Ms. Froese, the rash appeared on those portions of her body that were most exposed to the cleaning agents she was using. (Tr. at 1846—47). Although Dr. Lantsberger implied that the cleaning agents caused the rash, she was never asked whether she had an opinion on that matter.

Dr. Lantsberger testified that Ms. Froese complained of memory "difficulties." (Tr. at 1862.) She acknowledged, however, that "we never were able to do full neuropsychological testing on her." Id.

Plaintiffs' counsel did not ask Lantsberger whether Froese's reported memory difficulties were related to her work at Kaiser. Plaintiffs' counsel did ask, however, whether it is "harder to show by objective test" that a person who is not very bright has "been injured by exposure to chemicals." Id. Lantsberger said that it was, clearly implying that the jury could find organic brain damage notwithstanding the absence of neuropsychological testing. (Tr. at 1862-64.)

*(b) Cross-examination of Dr. Lantsberger*

On cross, Dr. Lantsberger was asked whether she would agree that the headaches which Ms. Froese complained of in 1989 were unrelated to work at Kaiser. Lantsberger equivocated, saying, "Other than the fact that Ms. Howell indicated that since the time that she worked there she's had persistent headaches. In relationship to the fact that a significant number of the coworkers complained of this, which means specific etiology causing an infectious relationship, no, I can't do that." (Tr. at 2772-73.)

When defense counsel pressed for a more concise answer, Lantsberger replied, "As a specific sole cause, no." (Tr. at 2773.)

Later, Dr. Lantsberger was asked by defense counsel whether Ms. Froese had experienced an alteration of consciousness during the cleanup. (Tr. at 2828.) In response,

Lantsberger testified that Froese "had commented that she had problems with headaches." (Tr. at 2829.) That led to the following exchange:

"Was a headache an alteration of consciousness," defense counsel wanted to know?

"It's a neurologic symptom," Lantsberger replied.

But "[I]s it an alteration of consciousness," defense counsel asked?

"Technically of consciousness, no," Lantsberger said. Id.

*(c) Redirect examination of Dr. Lantsberger*

On redirect, Lantsberger reversed her position on alteration of consciousness. With respect to that phenomenon, she now said, "That's often one of the symptoms of the chemical that is affecting the brain is by giving headaches." (Tr. at 3092.)

After soliciting that statement, counsel for the plaintiffs asked, "Did you take into account her alteration in level of consciousness and her low intellect in forming your opinions as to Kathrene Froese?" Id.

"Yes," Lantsberger replied, "I did." Id.

At that point, plaintiffs' counsel broke off her line of questioning. Although she suggested that she would "come back to that," she never asked Lantsberger whether Froese's alteration of consciousness caused a specific injury.

The final issue addressed on redirect was that of "aggravation." Counsel for the plaintiffs asked, "Would you please tell the jury if you have an opinion, based upon reasonable medical probability, s to Kathrene Howell Froese as a whole person in relationship to her condition and her exposure to the chemicals at the 1988 clean-up at the Kaiser Trentwood plant?" (Tr. at 3144.)

After an objection, Lantsberger responded by saying, "As I had indicated, I have to look at these people as a total. And I have to look at all of the information as an aggregate. And as a result of putting all of the information together, I believe that the problems that she is experiencing are an aggravation of her preexisting condition. Aggravated as a more probable than not cause from her exposure."" Id.

**6. Merlin Carlson**

Two experts analyzed the symptoms that Merlin Carlson reported. One was Dr. Daniel Goldstein. Although the defendants challenge the admissibility of his testimony on a number of other grounds, they concede that he testified – on a more probable than not basis – that Mr. Carlson sustained brain damage due to solvent exposure. (Defendants' Memorandum in Support of Renewed Motion at 82.)

The other expert who analyzed Mr. Carlson's symptoms was Dr. Lantsberger. Not only did she testify about respiratory problems (Tr. at 1922-23, 1925-26), but she also testified about fatigue, headaches, "overall body pain," and "whole person" aggravation. (Tr. at 1926, 3143.)

*(a) Direct examination of Dr. Lantsberger*

On direct, Dr. Lantsberger was asked whether she had an opinion regarding the cause of Mr. Carlson's "problems with breathing." (Tr. at 1925.) She said that she had reached the "same conclusion" with respect to his "breathing problems" that she had reached with respect to his "brain injuries," namely, "[t]hat he has a similar pattern as the other coworkers, and that the overall epidemilogical data leads me to believe that his exposure in the work site is the joining factor of all of the physical problems." (Tr. at 1926.)

Next, Dr. Lantsberger was asked whether there was a relationship between Carlson's complaints of "fatigue, headache, [and] overall body pain" and "exposure to chemicals in 1988." Id. She replied, in part, "The other coworkers complaining of the same, similar respiratory, cognitive, joing and body aches, leads me to assume based on epidemiological look at the exposure, the symptoms beginning about he same time frame and continuing subsequently leads me to believe that they are associated with the exposure." (Tr. at 1926-27.)

*(b) Cross-examination of Dr. Lantsberger*

Dr. Lantsberger acknowledged that it was during August, 1991, that she last made a note regarding Carlson's complaint if of breathing problems. (Tr. at 2935.) She further acknowledge that Carlson does not have Reactive Airways Dysfunction Syndrome, (Tr. at 2935), and that she has never diagnosed asthma. Id.

With respect to "bone pain and joint aches," she said, "I don't know what caused these guys to have the aches and pains,

but I do now that a significant number of the workers did have them." (Tr. at 2936.)

*(c) Re-direct examination of Dr. Lantsberger*

Dr. Lantsberger denied that it made sense to look at Merlin Carlson in terms of "isolated incidences [sic]." (Tr. at 3142-43.) Over objection, she testified, "In terms of his entire exposure, his preexisting as, as a consequence of his exposure, I think that his preexisting problems were aggravated by his exposure at Kaiser on a more probable that not basis." (Tr. at 3143.)

**7. Deborah Williams**

A number of experts testified for Ms. Williams, including Drs. Lantsberger, Morton and Keppel. Although much of Dr. Lantsberger's testimony may be construed as foundation for opinions given by other experts, she was asked to render opinions of her own. For example, during redirect, she reiterated her theory of aggravation, saying, "I think in terms of Debbie, again, . . . taking it in totality, that on a more probable than not basis, I think that her conditions as we have outlined them have been aggravated by her exposure at, by her work at the Kaiser plant." (Tr. at 3145.)

**8. Ruth Hopkins/John Hopkins**

The defendants concede that the Hopkins' principal claims involved respiratory injuries. The defendants argue, however, that the Hopkins also maintained a claim for brain damage. The record reflects the following concerning the defendants' contention:

During direct examination, Dr. Samuel Milham was asked by counsel for the Hopkins to read the conclusion of a study to the jury. Milham relied, in part, "[T]he severe neurologic injuries suffered by the workers in the incident are sobering reminders that easily preventable organic solvent related occupational illness continues to occur in a highly developed country in the late 20th century." (Tr. at 1436.) (Emphasis added.)

In addition, the Hopkins' attorney participated actively in the cross-examination of Dr. Neil Rosenberg, the defendant's expert on the subject of solvent-induced organic brain damage. (Tr. at 9473-89, 9529-40.) He questioned Rosenberg about neurologic injury in general, (see, e.g., Tr. at 9481-82), and Mrs. Hopkins' case in particular--including magnetic resonance

imaging ("MRI".) (Tr. at 9538-39.) He also had Rosenberg confirm that his testimony had nothing to do with the "pulmonary aspect of this case." (Tr. at 9540.)

During closing, the Hopkins' attorney devoted most of his time to pulmonary complaints. He did not restrict himself to that subject, however. For example, he asked the jury to think about Ruth Hopkins' "memory problems." (Tr. at 12022.) Later, he said, "These chemicals can hurt you. They can hurt your organs. They can hurt your brains." (Tr. at 12028.)

It was at this point that he asked the jury to discount Dr. Rosenberg's testimony about magnetic resonance imaging and Toluene abusers. In essence, he argued that his clients' exposure to organic solvents was distinguishable from that of the Toluene abusers Dr. Rosenberg had described, thereby implying that it was of no significance that Mrs. Hopkins's MRI was normal. (Tr. at 12028-29.)

**D. Sufficiency of Certain Expert Opinions (Analysis)**

A motion for judgment as a matter of law may be granted when "a party has been fully heard with respect to an issue and there is no *legally sufficient evidentiary basis for a reasonable jury to have found for that party* with respect to that issue . . . ." Fed.R.Civ.P. 50(a)(1). See Montiel v. City of Los Angeles, 2 F.3d 335, 342 (9th Cir.1993). The moving party must demonstrate that insofar as the verdict is concerned, the evidence permits but one reasonable conclusion. Conner v. Sakai, 15 F.3d 1463, 1467 (9th Cir.1993).

**1. Dan Glass**

Dr. Lantsberger examined Mr. Glass on three occasions. The first examination occurred during October, 1989; the second during May, 1990; and the third during September, 1991. Mr. Glass did not report respiratory problems on those occasions, nor did Dr. Lantsberger diagnose pulmonary injury or disability. Given the record as it now exists, a reasonable jury could not have found for Mr. Glass on that issue.

With respect to Mr. Glass' heart palpitations, Dr. Lantsberger could only say that they may have been related to his industrial exposure. Testimony of that sort is legally insufficient. Under Washington law, an opinion that a "physical disability 'might have' or 'possibly did' result from the hypothesized cause" is nothing more than conjecture. O'Donoghue v. Riggs, 73 Wn.2d

814, 824, 440 P.2d 823 (1968). "To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability." Id.

Regarding headaches and memory loss, Dr. Lantsberger was forced to concede that she had been unable to find a cause-and-effect relationship between Glass' participation in the Kaiser cleanup and his subsequent complaints. Thus, her testimony concerning those conditions falls short of the O'Donoghue standard.

Dr. Lantsberger attempted to bridge that causal gap by suggesting that Glass' "whole person" had been "aggravated." However, after Daubert and Claar, it is difficult to see how Lantsberger's fall-back theory can be considered "scientific knowledge." If none of Glass's specific symptoms can be linked to the cleanup on a more-probable-than-not basis, how is it possible that his whole person was aggravated?

It is the plaintiffs' burden to demonstrate that Dr. Lantsberger arrived at her conclusions "using scientific methods and procedures," and that her "conclusion [are] not mere subjective beliefs or unsupported speculation." Claar, 29 F.3d at 502. Insofar as Lantsberger's aggravation theory is concerned, the plaintiffs have failed to satisfy that requirement.

In conclusion, a reasonable jury could not have found for Glass on any of his claims. Dr. Lantsberger's causation testimony was legally insufficient, and her aggravation theory is not scientific knowledge.

**2. David Schudel**

It is undisputed that Mr. Schudel did not sustain neurologic injury as a result of his participation in the Kaiser cleanup. A reasonable jury could not have found for him on that issue. Similarly, although Dr. Lantsberger suggested that Schudel's exposure to chemicals caused actual pulmonary injury, she could say only that his "lung condition" was "related to his exposures." Given Lantsberger's uncertainty, a finding for Schudel on a claim of actual pulmonary injury would have been nothing more than speculation. O'Donoghue, 73 Wn.2d at 824.

Two possibilities remain. One is that Mr. Schudel has developed a conditioned response to chemicals as a result of

working at Kaiser. The other is that his whole person was aggravated. The latter has already been discussed. It is not sound science. With respect to the former (i.e., conditioned response), there are two serious questions. First, is Dr. Lantsberger qualified to render an essentially psychiatric opinion? Second, is there anything in the record to indicate that her opinion reflects scientific knowledge?

It is clear from Dr. Lantsberger's testimony that David Schudel's response to odors is psychological in nature. Notwithstanding its psychological nature, plaintiffs' counsel made no effort to show that Dr. Lantsberger is qualified to diagnose or treat psychological disorders. Indeed, she freely admitted that she is not an expert in psychiatry. (Tr. at 2337.)

Even if Dr. Lantsberger was qualified to render a psychiatric opinion of the sort she gave here, plaintiffs' counsel failed to establish that Lantsberger's conclusion reflects sound science. Not one journal article was offered in support of Dr. Lantsberger's opinion, nor was an effort made to satisfy any of the other Daubert criteria. As a result, Dr. Lantsberger's opinion fails to pass Rule 702 muster.

**3. Craig Thompson**

Dr. Lantsberger failed to link any of Mr. Thompson's specific complaints to the Kaiser project on a more-probable-than-no basis. Her fall-back was "aggravation," a theory which does not meet the standards for admissibility established by Rule 702. It follows that the jury's verdict in Mr. Thompson's favor was based upon speculation, nothing more.

**4. Tim Schudel**

Dr. Lantsberger acknowledge that Mr. Schudel "needed to have a pulmonary work-up by a pulmonologist," but that she "never did get him in to see one." Notwithstanding the absence of expert pulmonological evidence, Lantsberger suggested that Schudel developed respiratory problems as a result of his exposure to "chemicals." In that regard, however, she could say only that he told her that he had not had problems before Kaiser and that he did have problems after Kaiser.

That Mr. Schudel's symptoms appeared after he worked at Kaiser may establish a temporal link between work and symptoms, but it does not establish a causal link. See Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 974 (4th Cir.1990)

(mere fact that a child suffered seizures after receiving a vaccination insufficient to establish causation). Dr. Lantsberger's testimony on that point is therefore insufficient.

Tim Schudel obtained neuropsychological testing. While the psychologist report that it was possible that Schudel's previous learning disabilities had been aggravated, he could not say that aggravation was reasonably certain. Indeed, as soon as Schudel was counseled regarding the report's findings, he quit complaining of memory loss. Given those undisputed facts, a reasonable jury could not have found for Mr. Schudel on the question of neurological injury.

That leaves Dr. Lantsberger's aggravation theory. It is neither scientifically nor causally sufficient to suport the jury's verdict.

**5. Kathrene Froese**

A reasonable jury could have found for Ms. Froese on her respiratory claim. Were that her only claim, no further discussion would be necessary. However, it was not. Dr. Lantsberger was asked to testify regarding Ms. Froese's complaints of rash, memory loss, and headaches. With respect to these symptoms, Dr. Lantsberger was either never asked about a causal relationship, or if she was, her testimony fell short of the O'Donoghue standard.

**6. Merlin Carlson**

Mr. Carlson's principal claim was for toxic encephalopathy. He did not stop there, however. Dr. Lantsberger reported breathing problems, fatigue, headaches, and "overall body pain."

With respect to respiratory complaints, Dr. Lantsberger was forced to concede that Mr. Carlson does not have Reactive Airways Dysfunction Syndrome or industrially induced asthma. Similarly, with respect to "bone pain and joint aches," she could only say, "I don't know what caused these guys to have the aches and pains, but I do know that a significant number of the workers did have them." Given the record, a reasonable jury could not have found for Mr. Carlson on his non-neurological claims.

**7. Deborah Williams**

Ms. Williams presented claims for organic brain damage and respiratory injury. A number of experts testified on her behalf. Although Dr. Lantsberger opined that Ms. Williams'

"conditions" were aggravated by work at Kaiser, it is questionable whether her testimony would have had appreciable impact on the jury's verdict.

**8. Ruth Hopkins/John Hopkins**

Based upon the evidence presented by the Hopkins, their cross-examination of Dr. Rosenberg, and the manner in which they argued their case, a reasonable jury would have assumed the Hopkins were making a claim for brain damage. Granted, the jury may not have viewed it as the Hopkins' principal claim, both the jury would have understood that it was a very real part of the Hopkins' case. Therein lies the problem. Having chosen to make a claim for solvent-induced brain damage, the Hopkins were obligated to prove it. They failed to do so. A reasonable jury could not have found that the Hopkins suffered neurologic injuries as a proximate cause of the defendants' negligence. The defendants are therefore entitled to judgment as a matter of law on that particular claim.

**E. Sufficiency of Certain Expert Opinions (Conclusion)**

In view of the foregoing, the defendants are entitled to judgment as a matter of law on a number of claims. They include the following: all claims asserted by Dan Glass, David Schduel, Craig Thompson and Tim Schudel; all non-respiratory claims asserted by Kathrene Froese; all non-neurological claims asserted by Merlin Carlson; and all non-respiratory claims asserted by the Hopkins.

Although several claims must be dismissed, several remain. The next question is whether a new trial is necessary.

Approximately six weeks prior to trial, the Court asked the plaintiffs to list their claims against the defendants. (Order Re Daubert Procedure (Ct. Rec. 326) at 7.) The plaintiffs declined to do so. (Plaintiffs' Lists of Claims (Ct. Rec. 334).) Instead, they presented the jury with a long list of symptoms, only some of which could be connected to the plaintiffs' work at Kaiser on a more probable than not basis. Furthermore, when it came time to instruct the jury, the plaintiffs rejected a suggestion that the jurors be asked to decide specific claims.

The plaintiffs' choice of tactics has placed the Court in an awkward position. Because the jurors were not asked to return verdicts with respect to each plaintiff's individual claims, it is now impossible to separate the wheat from the chaff. Thus, the Court

is forced to conclude that the verdicts in favor of Kathrene Froese, Merlin Carlson, Ruth Hopkins and John Hopkins are too tainted to stand. For that reason, the plaintiffs' remaining claims must be re-tried.

## III. DEFENDANTS' MOTION FOR NEW TRIAL

The defendants give twelve reasons why the Court should order a new trial. Fed.R.Civ.P. 59. They include the following: First, by urging the jury to "send a message" to the defendants, the plaintiffs injected irrelevant, arbitrary, and punitive considerations into the jury's deliberations. Second, the Court failed to instruct the jury on Washington's medical causation standard. Third, the Court's instructions with respect to state and federal safety regulations were in error. Fourth, the Court failed to instruct the jury on the limited duties of the employer of an independent contractor. Fifth, the plaintiffs violated a pretrial order by introducing evidence regarding Daniel Skeman. Sixth, the Court applied Bryan v. John Bean, 566 F.2d 541 (5th Cir.1978), in an improper manner. Seventh, the defendants should have been allowed to cross-examine the plaintiffs regarding inconsistent statements made to Diane Nebel. Eight, the plaintiffs should not have been allowed to offer evidence regarding symptoms experienced by non-plaintiff workers. Ninth, the plaintiffs were permitted to suggest that a defense expert had no basis for opining that Mrs. Hopkins's depression had a cause other than that suggested by her experts. Tenth, the jury's verdict was against the weight of the evidence. Eleventh, the damages awarded were excessive both as a matter of fact and a matter of law. Twelfth, the defendants' right to cross-examination was violated.

Given the Court's various rulings with respect to the defendants' motion for judgment as a matter of law, the defendants' alternative request for a new trial is moot with respect to all but Deborah Williams. Insofar as she is concerned, the defendants' motion is denied.

## IV. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS

On July 22, 1994, the plaintiffs filed a timely request for attorneys' fees, together with a request for costs beyond those normally awarded to prevailing parties. Fed.R.Civ.P. 53(d). The defendants have objected to both.

Since then, the Court has granted the defendants' Rule 50(b) motion in substantial part, dismissing a number of the plaintiffs' claims. Only the verdict in favor of Ms. Williams remains intact. However, because it does, she may be entitled to fees and costs.

The Court has two options concerning Ms. Williams's request. It can defer ruling until after the appellate process has run its course, or it can decide the matter of fees and costs at this juncture. Fed.R.Civ.P. 58 advisory committee's note (1993 amendment).

The latter is the best course. This lawsuit has generated a number of complex legal questions, among them whether Ms. Williams is entitled to fees and costs. Instead of presenting them to the Court of Appeals piecemeal, it is best to resolve as many as possible now so that they may be reviewed together. Id. ("in many cases it may be more efficient to decide fee questions before an appeal is taken").

One final issue must be addressed before turning to the merits of Ms. Williams's request- -the matter of the Court's jurisdiction. As the advisory committee noted, post-trial fee requests can create complicated jurisdictional questions. To avoid them, Rule 58 permits a district court to treat a request for fees as a Rule 59 motion and extend the time for appeal from the underlying judgment. Fed.R.Civ.P. 58. It is appropriate to do so here, and the Court so orders.

**A. Attorneys' Fees**

Ms. Williams submits that her request for fees may be granted under either of two theories. One is based upon state law, the other upon federal law. The two theories will be examined separately.

(a) State Law

When a request for attorneys' fees is made in a diversity action, and the request arises from the substance of a state-law claim, the

request is governed by the law of the forum state. Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir.1992). Washington follows the "American Rule." Dayton v. Farmers Insurance Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). According to that rule, a court has not power to award attorney fees as a cost of litigation absent a contract, a statute, or some recognized principle in equity. Id. Here, there is neither a contractual nor an equitable basis for awarding fees. If Ms. Williams is to recover attorneys' fees, she must cite a statute which authorizes them. She attempts to do just that.

According to Ms. Williams, the defendants violated the Washington Industrial Safety and Health Act ("WISHA")[14] by failing to provide adequate warnings regarding the solvents used in the cleanup. She does not assert that the defendants are liable for fees under WISHA , however. Instead, she argues that the defendants are liable for attorneys' fees under one of three entirely separate statutes- - the Worker and Community Right to Know Act.,[15] the Hazardous Waste Management Act,[16] or the Model Toxics Control Act.[17]

Although ingenious, Ms. Williams's state-law theory is without merit. First, the jury did not find that the defendants violated either WISHA or any regulation promulgated thereunder. Thus, there would appear to be no basis for Ms. Williams's assertion that the defendants violated that statute. Second, while it is true that the Worker and Community Right to Know Act, the Hazardous Waste Management Act, and the Model Toxics Control Act authorize fees in certain limited situations, there is nothing in them to suggest that their (respective) fee provisions can be invoked based upon a violation of an entirely separate statute. See, e.g., RCW 49.70.150 (a civil action may be brought to "compel compliance with the provisions of this chapter or any rule promulgated under this chapter"); RCW 70.105.097 (a "person injured as a result of a violation of this chapter or the rules adopted thereunder may bring an action . . ."); RCW 70.105D.00 ("a person may bring a private right of action . . . for the recovery of remedial action costs"). Finally,

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[14] RCW Chapt. 49.17.
[15] RCW Chapt. 49.70
[16] RCW Chapt. 70.105.
[17] RCW Chapt. 70.105D.

neither Ms. Williams nor any of the other plaintiffs included the matter of attorneys' fees in the pretrial order. See Price Dev. Co. v. Redevelopment Agency, 852 F.2d 1123, 1128 (9th Cir.1988) (denying request for fees where pretrial order contained no indication that parties would be seeking fees).

**(b)** Federal law

Ms. Williams also seeks fees under 28 U.S.C.§ 1927. That statute provides that an "attorney . . . who so multiplies the proceedings . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Without question, the attorneys for the defendants mounted a very aggressive defense on behalf of their clients. There is no evidence, however, that they acted in bad faith. For that reason, § 1927 is inapplicable here. See MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1122 (9th Ciri.1991) (§1927 requires a finding of bad faith).

**B. Costs**

In light of the Court's prior rulings, it is clear that Ms. Williams will need to revise her request for costs. She should consider the following in doing so:

Ms. Williams asked for expert witness fees. Since none of her witnesses were court-appointed, she is limited to the sums authorized by 28 U.S.C. § 1821. See Association of Flight Attendants v. Horizon Air, 976 F.2d 541, 551-52 (9th Cir.1992).

Ms. Williams seeks reimbursement for obtaining copies of depositions. Although district courts have the authority to tax such costs, Alflex Corporation v. Underwriters Laboratories, 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 61, 116 L.Ed.2d 36 (1991), the exercise of that discretion is often guided by local rule. In this district, "[s]tenographic fees for depositions may be allowed only when the deposition is used at trial or hearing for substantive, as opposed to impeachment purposes. Only the original deposition shall be taxed." Local Rule ("LR") 54(f) (2).

In addition, Ms. Williams may be asking for other costs associated with the taking of depositions. If so, she must demonstrate that the costs were necessarily incurred. See Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1438-39 (9th Cir.1993).

Finally, Ms. Williams seeks compensation for expenses

assumed in obtaining daily transcripts of court proceedings. Because of the length and complexity of the case, Ms. Williams is entitled to an award of costs for those portions of the daily transcript necessary for presentation of her claims. See Independent Iron Works, Inc. v. United States Steel Corporation, 322 F.2d 656, 678 (9th Cir.) (trial transcripts were reasonably necessary given the complexity and length of proceedings), cert. denied, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963).

## V. MOTION TO AMEND VERDICT

Kaiser Aluminum and Chemical Corporation is one legal entity; Kaiser Aluminum Corporation is another. Since at least October, 1991, it is Kaiser Aluminum and Chemical Corporation which has been one of the two named defendants in this action.

The jury returned its verdict on July 13, 1994. Judgment was entered that same day. The judgment refers to Kaiser Aluminum Corporation, not Kaiser Aluminum and Chemical Corporation.

Defendant Kaiser Aluminum and Chemical Corporation now moves the Court, pursuant to Rule 60, to amend the judgment to reflect its true name. The plaintiffs do not object.

Kaiser aluminum and Chemical Corporation is correct. The wrong corporate entity was listed in the judgment. As a result, its motion will be granted and the judgment modified accordingly.

## VI. MOTION TO SET DISCOVERY HEARING

The Plaintiffs move the Court to set a hearing to investigate their allegations that the defendants abused the discovery process. No authorities have been cited in support of this request.

Given the Court's previous rulings, the plaintiffs' motion is (at best) premature. Consequently, their motion will be denied.

## VII. MOTION TO STAY EXECUTION OF JUDGMENT

The defendants move the Court to stay any proceedings to enforcement the judgment pending resolution of their post-trial motions. Fed.R.Civ.P. 62(b). With entry of this order, the defendants' request becomes moot. It will therefore be denied.

## IT IS HEREBY ORDERED:

1. The plaintiffs' motion to strike defense motions as untimely **(Ct. Rec. 536)** is **denied.**

2. The defendants' motion to strike plaintiffs' memorandum **(Ct. Rec. 565)** is **denied.**

3. The plaintiffs' motion to strike reply **(Ct. Rec. 552)** is **denied.**

4. The defendants' motion for judgement as a matter of law **(Ct. Rec. 488)** is **denied** in part and **granted** in part. The judgments entered herein are re-opened and modified as follows:

(a) The defendants are granted judgment as a matter of law on all claims asserted by Dan Glass, David Schudel, Craig Thompson and Tim Schudel. Those claims are dismissed with prejudice.

(b) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Kathrene Froese. Those claims are dismissed with prejudice.

(c) The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin Carlson. Those claims are dismissed with prejudice.

(d) The defendants are granted judgment as a matter of law on all non-respiratory claims asserted by Ruth Hopkins and John Hopkins. Those claims are dismissed with prejudice.

5. The defendants are granted a new trial on all remaining claims.

6. The defendants' motion for new trial or alternative relief **(Ct. Rec. 486)** is **denied**.

7. The plaintiffs' timely request for attorneys' fees and costs shall have the same effect under Fed.R.App.P. 4(a)(4) as a Rule 59 motion, and the period for filing a notice of appeal shall be extended accordingly.

8. The plaintiffs' request for attorneys' fees and costs is **denied** in part and **granted** in part. Ms. Deborah Williams is directed to submit a revised cost bill.

9. Defendant Kaiser Aluminum and Chemical Corporation's motion to amend or correct judgments **(Ct. Rec. 513)** is granted. The judgments entered herein shall refer to "Kaiser Aluminum and Chemical Corporation," not "Kaiser Aluminum Corporation."

10. The plaintiffs' motion for order shortening time **(Ct. Rec. 555)** is **denied**.

11. The plaintiffs' motions for order setting hearing on discovery abuses **(Ct. Recs. 534 and 563)** are **denied**.

12. The defendants' motion for stay of proceedings to enforce judgments **(Ct. Rec. 490)** is **denied.**

**IT IS SO ORDERED**. The Clerk is hereby directed to file this order, enter judgment accordingly, and furnish copies to counsel.

**DATED** this 22 day of November 1994.

s/_____
FRED VAN SICKLE
United States District Judge

FILED IN THE
US DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
JAN 17 1995
JAMES R. LARSEN, CLERK
_____DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|---|---|
| DAVID SCHUDEL, et. al., et. ux.,<br>Plaintiffs,<br>v.<br>GENERAL ELECTRIC COMPANY and KAISER ALUMINUM CORPORATION,<br>Defendants. | NO. CS-92-081-FVS<br><br>ORDER RE MOTIONS TO AMEND AND CERTIFY |

**BEFORE THE COURT** are motions to amend Order Re Post-Trial Motions,[18] and to authorize appeals from it. All motions were heard without oral argument on January 13, 1995.

**CLAIM OF SANDRA SCHUDEL**

*Relief Requested*

Mr. Timothy Schudel alleged that he suffered various injuries while working on the Kaiser cleanup project. His wife, Sandra Schudel, brought separate claims for loss of consortium based upon the injuries her husband allegedly suffered. Mrs. Schudel's loss-of-consortium claims were not addressed in the Order Re Post-Trial Motions. Now that Timothy Schudel's claims have been dismissed with prejudice, the defendants move the Court to dismiss Sandra Schudel's loss-of-consortium claims.

*Ruling*

The defendant's motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants will be dismissed with prejudice.

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[18] The order was entered on November 25, 1994. It is docketed as pleading 571.

**MOTION FOR NEW TRIAL**

*Relief Requested*

After the jury returned its verdicts, the defendants moved for a new trial (Ct. Rec. 486). Except in the case of Deborah Williams, the Court did not address the merits of the defendants' motion. (In her case, the defendant's motion was denied.) The defendants now move the Court, pursuant to Fed.R.Civ.P. 50(c)(1), to issue a conditional ruling with respect to the other plaintiffs.

*Ruling*

The defendant's motion for new trial will be denied with respect to all plaintiffs.

**HOPKINS' MOTION TO RECONSIDER**

*Relief Requested*

Plaintiffs Ruth Hopkins and John Hopkins move the Court to reconsider its decision vacating the verdicts in their favor and ordering a new trial. If the Court declines to do so, Ruth Hopkins moves the Court to clarify its order regarding her claims. She notes that the Order Re Post-Trial Motions dismisses all non-respiratory claims. She wants to know whether the Court intended to preclude her from recovering for depression (allegedly) spawned by her respiratory problems.

*Ruling*

The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except with respect to Ruth Hopkins's request for clarification of the Court's ruling regarding recovery of damages for depression. If, upon retrial, Ruth Hopkins proves that she suffered depression as a result of respiratory problems caused by the defendants, she may recover damages for her depression.

**RULE 54(b)**

*Relief Requested*

Both sides move the Court to authorize appeals of the judgments adjudicating the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra

Schudel. Fed.R.Civ.P. 54(b) (1994).[19] In addition, plaintiffs Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins move the Court to permit them to appeal the order granting a new trial.

*Analysis*

Under Rule 54(b), the Court must first determine whether a final judgment exists. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). Once that task has been completed, the Court must decide whether there is any just reason to delay the appellate process. Id. at 8, 100 S.Ct. at 1465. In doing so, the Court must consider both the administrative impact of releasing claims for appeal, and "the equities involved." Id. at 8, 100 S.Ct. at 1465.

1. Existence of final judgments

The claims of ten plaintiffs are at issue in this action. Now that the Court has entered its Order Re Post-Trial Motions, the claims of Deborah Williams, Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel have been fully adjudicated. What of the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins?

In its order, the Court ruled that these four plaintiffs (i.e., Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins) could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment. See Arizona State Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir.1991) (holding that an order dismissing a claim for punitive damages was not final).

2. No just reason for delay

(a) Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel

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[19] Rule 54(b) states, in pertinent part, "When more than one claim for relief is presented in an action, ..., or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The record is now complete with respect to these five claims. Nothing that might occur in district court will affect appellate review of these dismissals. It is now up to the Court of Appeals to determine whether each dismissal was proper. In doing so, the Court of Appeals will have to review each claim separately. Consequently, authorizing these five plaintiffs to appeal will not result in unwarranted duplication of appellate effort.

(b) Deborah Williams

The verdict in favor of Ms. Williams was upheld. Appellate review of that verdict will facilitate adjudication of those claims which must be retried.

3. The four remaining claims

The Court ordered a new trial with respect to the claims of Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins. An order granting a new trial is interlocutory. As a general rule, it is not appealable under 28 U.S.C. §1291. Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir.1985); Eaton v. National Steel Products Company, 624 F.2d 863, 864 (9th Cir.1980). There is an exception to that rule, however. An order granting a new trial may be appealed if the district court no longer had jurisdiction to do so. See Eaton, 624 F.2d at 864.

Here, the plaintiffs moved to strike the defendants' post-trial motions, arguing that they were untimely. The Court denied the plaintiffs' motion, and granted post-trial relief. Should the Court of Appeals disagree with this Court's assessment of the timeliness of the defendants' post-trial motions, the Court of Appeals will have to determine whether this Court had authority to enter its Order Re Post-Trial Motions. Thus, the Eaton exception applies.

*Ruling*

There is no just reason to delay appeal of the Order Re Post-Trial motions.

**COST BILLS**

Plaintiff Deborah Williams has submitted a revised cost bill. No objections have been filed. Ms. William's request will therefore be approved.

The defendants are now the prevailing parties with respect

to the claims asserted by Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel. The defendants move the Court (Ct. Rec. 274) for an order indicating that they have ten days from Rule 54(b) certification to file cost bills. Their request will be granted.

**IT IS HEREBY ORDERED:**

1. The defendants' motion to amend (Ct. Rec. 574) is granted. Ms. Sandra Schudel's claims against the defendants are dismissed with prejudice.

2. The defendants' motion for a conditional ruling (Ct. Rec. 574) is granted in part. The defendants' prior motion for a new trial (Ct. Rec. 486) is denied with respect to all plaintiffs.

3. The Hopkins' motion for reconsideration (Ct. Rec. 580) is denied except as indicated above.

4. The parties respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted.

(a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and

(b) Since the Clerk has already entered judgment as directed by the Order Re Post-Trial Motions, that judgment (Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order.

5. Deborah Williams's cost bill is approved.

6. The defendants are to submit a cost bill with respect to the claims of Dan Glass, David Schudel, Craig Thompson, Tim Schudel, and Sandra Schudel within ten days of entry of this order.

7. Any other pending motions are denied as moot.

**IT IS ORDERED.** The Clerk is hereby directed to file this order, furnish copies to counsel, and close the case.

**DATED** this 13 day of January 1995.

s/
FRED VAN SICKLE
United States District Judge

FILED
MAR 24 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

# UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

| | |
|---|---|
| DAVID SCHUDEL, et al., | Nos. 94-36250 |
| | 95-35010 |
| Plaintiffs/Appellants/ Cross-Appellees, | 95-35092 |
| | 95-35145 |
| | DC# CV-92-81-FVS |
| vs. | Eastern Washington |
| | (Spokane) |
| GENERAL ELECTRIC COMPANY, a foreign corporation, et al., | ORDER |
| Defendants/Appellees/ Cross-Appellants. | |

Before: SNEED, POOLE, and BRUNETTI, Circuit Judges.

Appeal Nos. 94-36250 and 95-35010 are dismissed as duplicative. All pending motions in these appeals are denied as moot.

Appellants' motions filed in appeal No. 95-35092 to remand this case to the district court are denied without prejudice to the parties raising this or any jurisdictional issue in the briefs on the merits.

The motion of cross-appellee Deborah Williams to dismiss cross-appeal No. 95-35145 for lack of a timely notice of appeal is denied. See Fed. R. App. P. 4(a)(4).

Cross-appellant General Electric's motion to dismiss appeal No. 95-35092 for lack of jurisdiction is denied. See Freeman v. Hittle, 747 F.2d 1299, 1301-02 (9th Cir. 1984). 94-36250, 95-35010, 95-35092, 95-35145

-2-

Appellant/Cross-Appellees' motion to strike General Electric's motion to dismiss appeal No. 95-35092 is denied.

The briefing schedules previously established in appeal Nos. 95-35092 and 95-35145 respectively shall be vacated. The Clerk shall establish a new cross-appeal briefing schedule in these appeal.

**NOT FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

DAVID SCHUDEL, et al.,
Plaintiffs,
and

DEBORAH GUARAGNA-WILLIAMS,
Plaintiff-Appellee,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellants.

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; JOHN HOPKINS; RUTH HOPKINS, husband and wife, and the marital community composed thereof,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Appellees.

FILED
NOV 24 1997
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

**No. 95-35092**

**D.C. No.**
**CV-92-00081-FVS**

**No. 95-35145**
**D.C. No.**
**CV-92-00081-FVS**

**ORDER**

Before: BROWNING, D.W. NELSON, and FERNANDEZ, Circuit Judges

The petition for rehearing of Merlin E. Carlson, Jr. is DENIED.

The panel has voted to DENY the petition for rehearing of David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, Deborah Williams, and Kathrene Froese. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The panel has voted to DENY the petition for rehearing of John Hopkins and Ruth Hopkins. Judge Browning and Judge Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Nelson so recommends.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

FILED IN
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 13 1994
JAMES R. LARSEN, CLERK
_____DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | | |
|---|---|---|
| DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARANGA WILLIAMS; and JOHN HOPKINS and RUTH HOPKINS, husband and wife and the marital community composed thereof. | ) | JUDGMENT IN A CIVIL CASE |
| Plaintiff (s). | ) | CASE NUMBER: CS-92-0081 |
| vs. | ) | |
| GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation. | ) | |
| Defendant (s). | ) | |

This action came on for trial before the Court and a jury, Honorable Fred Van Sickle, District Judge, presiding, and the

issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff, Tim Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Fifty-One Thousand Two Hundred Seventy Dollars ($1,051,270.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Sandra Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Fifty Thousand Dollars ($50,000.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Three Hundred Forty-Eight Thousand Twenty Dollars ($1,348,020.00), with interest there on at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on her claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruth Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Four Thousand Forty Dollars ($1,404,040.00) with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, John Hopkins, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Six Hundred Two Thousand Two Hundred Fifty Dollars ($602,250.00) on his claim for loss of consortium, with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Merlin Carlson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Two Million Seven Hundred Seventy-Five Thousand Seven Hundred Sixty-Eight Dollars ($2,775,768.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Daniel Glass, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Nine Hundred Fifty-Six Thousand One Hundred Forty-Six Dollars ($956,146.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Deborah Guaragna Williams, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Nine Hundred Seven Thousand Seven Hundred Eighty-Three Dollars ($1,907,783.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, Kathrene Froese, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million Four Hundred Fifty-Nine Thousand Three Hundred Thirty-Two Dollars ($1,459,332.00), with interest thereon at the rate of 5.31% as provided by law, and her costs of action;

IT IS ORDERED AND ADJUDGED that the plaintiff, David Schudel, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of One Million One Hundred Thirty Thousand Seven Hundred Eleven Dollars ($1,130,711.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action; and

IT IS ORDERED AND ADJUDGED that the plaintiff, Craig Thompson, recover of the defendants General Electric Company and Kaiser Aluminum Corporation, the sum of Five Hundred Fifty-Six Thousand One Hundred Ninety-Nine Dollars ($556,199.00), with interest thereon at the rate of 5.31% as provided by law, and his costs of action.

Dated: July 13, 1994

JAMES R. LARSEN, Clerk

by: s/_____
Charles L. Randazzo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

| | | |
|---|---|---|
| DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHERENE FROESE; CRAIG A. THOMPSON; DEBORAH GUARAGNA WILLIAMS; and JOHN and RUTH HOPKINS, husband and wife and the marital community composed thereof, | ) | NO 92-CS-0081-FVS |
| Plaintiffs | ) | SPECIAL VERDICT FORM MERLIN CARLSON |
| v. | ) | |
| GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, | ) | |
| Defendants. | ) | |

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We, the jury, make the following answers to the questions submitted by the court on the claim of Merlin Carlson:

**QUESTION NO. 1:** Were either of the defendants negligent? Answer "yes" or "no" after the name of each defendant.

| Answer | Yes | No |
|---|---|---|
| Defendant General Electric Co. | X | ___ |
| Defendant Kaiser Aluminum Corp. | X | ___ |

If you answer Question No. 1 "no" as to both defendants sign and return this verdict. If you answer Question No. 1 "yes" as to one or both of the defendants, then answer Question No. 2.

**QUESTION NO. 2:** Was such negligence a proximate cause of injury to Merlin Carlson?

Answer "yes" or "no" after the name of each defendant.

| Answer | Yes | No |
|---|---|---|
| Defendant General Electric Co. | X | ___ |
| Defendant Kaiser Aluminum Corp. | X | ___ |

If you have answered "yes" to either defendant on Question No. 2, then answer Question No. 3. If you have answered "no" as to both defendants then sign and return this verdict.

**QUESTION NO. 3:** We the jury find for the plaintiff, Merlin Carlson, in the sum of $ 2,775,768.00 .

If you answer Question No. 3 with any amount of money, answer Question No. 4. If you find no damages, sign and return this verdict.

**QUESTION NO. 4:** Was Merlin Carlson the loaned servant of General Electric Company?

Answer "yes" or "no". NO

Sign and return this verdict.

DATED this 13TH day of July, 1994.

s/Diana Waura
Presiding Juror

# PUBLISHER'S NOTE:

**THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:**

A60-A61

# APPENDIX D

## U.S. CONSTITUTION AMENDMENT VII

### CIVIL TRIALS

In Suits of common law, where the value and controversy shall exceed $20.00, right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## U.S. CONSTITUTION AMENDMENT V

[V.]

**Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property without due process of law; nor shall private property be taken for public use, without just compensation.

## U.S. CONSTITUTION ARTICLE III

**§ 1. Judicial power; Tenure of office**

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

## § 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consultants;—to all Cases of admiralty and maritime Jurisdiction;—to Conservatories between two of more States,—between a State and Citizens of another State;—between citizens of different States, between citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens of Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed, but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## § 3. Treason; proof and punishment

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted to Treason unless testimony of two witnesses to the same Act, of on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, of Forfeiture except during the Life of the Person attainted.

# FEDERAL RULES OF CIVIL PROCEDURE

**Rule 8. General Rules of Pleading**

**(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

. . .

**(e) Pleading to be Concise and Direct; Consistency.**

**(1)** Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

**Rule 49. Special Verdicts and Interrogatories**

**(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails

to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

**Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict (Pre-1991 Amendment)**

**(a) Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

. . .

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

**Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings**

**(1991 Amendment Version)**

**(a) Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

**(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.** Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

**Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings (December 1995 Version)**

**(a) Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim of defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

. . .

**(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deter deciding the legal questions raised by the motion. The movant may renew its request for judgement as a matter of law by filing by filing a motion no later than 10 days after entry of judgement- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

**Rule 59. New Trials; Amendment of Judgments**
**(1966 Version)**

**(a) Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

. . .

**(d) On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reasons for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefore.

**(e) Motion to Alter or Amend the Judgment**. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1 966, eff. July 1, 1966)

**Rule 59 New Trials; Amendment of Judgments (1995 Version)**

. . .

**(d) On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

. . .

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995.)

**28 U.S.C. § 2072. Rules of procedure and evidence; power to proscribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for bases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100-702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 46-48, and amended Pub.L. 101-650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.)

**21. Facts and facts issues**

Courts cannot trench on providence of jury upon questions of fact under this provision. State v. Furth (1940) 5 Wash.2d 1, 104 P.2d 925.

Right to trial by jury must mean that accused has right to have jury pass upon every substantive fact going to question of his guilt or innocence, otherwise this provision would be rendered void and utterly fail in purpose which our people have always believed it was intended to accomplish. State v. Strasburg (1910) 36 Wash. 106, 110 P. 1020, Ann. Cas. 1912B 917.

**5.40.050. Breach of duty-Evidence of negligence-Negligence per se**

A breach of a duty imposed by stature, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor of any drug, shall be considered negligence per se.
Enacted by Laws 1986, ch. 305, § 901.